



Docket No.: RPC 0575 PUS  
Serial No. 09/921,762

AF/3727

UNITED STATES PATENT AND TRADEMARK OFFICE

APPELLANT: Justin M. Smyers, et. al EXAMINER: Castellano  
SERIAL NO.: 09/921,762 GROUP ART UNIT: 3727  
FILING DATE: August 3, 2001  
FOR: Stackable Crate  
DOCKET NO.: RPC 0575 PUS

APPEAL BRIEF

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Dear Sir:

Appellant files this Appeal Brief pursuant to the Notice of Appeal filed February 2, 2004.

**Real Party in Interest**

The real party in interest is Rehrig Pacific Company, the Assignee of the entire right and interest in this application by assignment recorded on August 3, 2001, at Reel 012056, Frame 0004.

**Related Appeals and Interferences**

There are no related appeals and interferences.

**Status of the Claims**

All of the pending claims, claims 1-15 and 25-47, are rejected and appealed.

**CERTIFICATE OF MAIL**

I hereby certify that the enclosed Appeal Brief (in triplicate) is being deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on April 2, 2004.

Konstantine J. Diamond

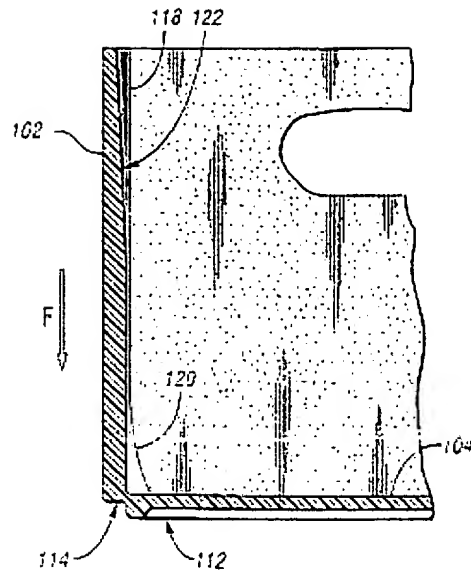


In addition, crates have been molded or formed so that the interior side walls 10 possess a taper or draft (denoted by an outwardly curved or angled inner surface 18 in Figure 1) to increase the dimension of the opening of the crate at the upper inner edge surface of the crate and improve manufacturability. Increasing the dimension of the opening at the upper inner edge of the crate eases loading and unloading of products to and from the crate.

However, this also increases the clearance between the outside of the drag rail of a stacked crate and the upper edge and retaining face of the lower crate. As a consequence, the lateral tolerance between stacked crates is too great, thereby potentially compromising the stability and alignment of a stack of crates.

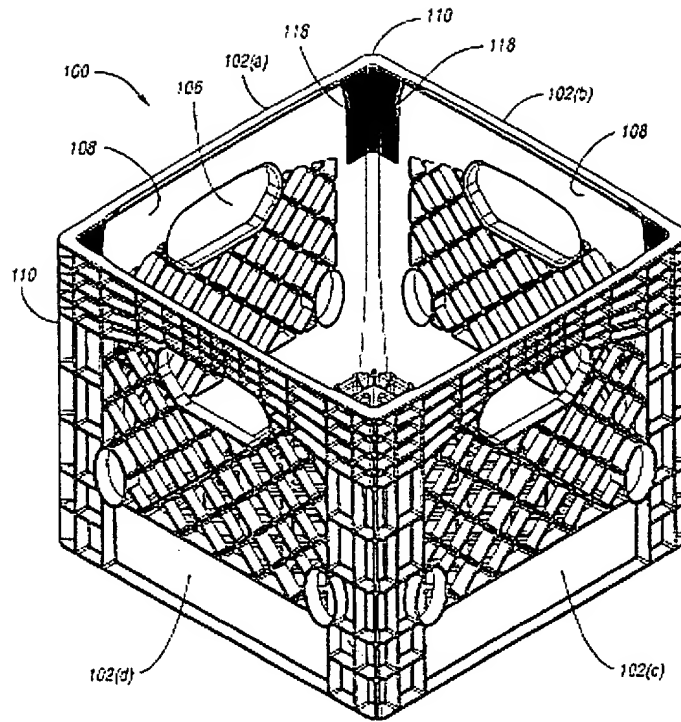
In addition, the drag rail of known crate designs is spaced away from the outer edge of the crate to facilitate nesting within another crate when stacked thereon. This spacing is denoted by reference number 20 in Figure 1. Because of the spaced relationship, any vertical load forces F placed on the side walls 10 can not be directly transferred down to the floor surface because the drag rail 16 is not positioned in vertical alignment with the side walls 10. Instead, the drag rail 16 operates as a fulcrum. This undesirably results in added stresses in the bottom area "fulcrum" due to its inability to resist top load compression. The added stresses result in deflection and potential unbalancing of a stacked formation.

In the present invention, selected areas 118 (shown in blue in Figures 2 and 5 below) of the inner surface of the side walls 102 are formed at or near the upper inner edge of the crate so that they reduce the dimension of the crate opening in the selected areas and provide a tighter fit with a drag rail 112 of a crate stacked thereon. This may be provided by reducing the taper in the selected areas 118. In the example shown, the taper is eliminated. The reduced taper produces a smaller inner diameter crate opening in the selected areas 118 (e.g., the corners of the crate as shown) which in turn produces a tighter lateral tolerance or fit in the upper corners of the crate.



*Fig. 5*

In accordance with another aspect of the present invention, a portion 120 (shown in yellow) of the inner surface of each wall 102 is contoured so as to extend over the drag rail 112. More specifically, as shown in Figure 5 above, a portion 120 of each side wall 102 is molded with a variable radius blend into the bottom surface 104. The amount or degree of varying radius is selected so that the affected portion of the side wall inner surface is positioned over the drag rail 112.



*Fig. 2*

As can be seen in Figure 2 above, in the illustrated embodiment, the variable radius blend portion 120 (yellow) is formed at each bottom corner of the crate. However, it will be understood that the variable radius blend portion could be located at other locations. By extending over the drag rail 112, the variable radius blend portion 120 allows loading forces (designated as “F” in Figure 5) to be directly transferred down to the drag rail. This improves overall strength and rigidity of the crate without adding material or reinforcement.

### **Issues**

I) The final rejection of claims 1-4, 32-38 and 40-43 under 35 U.S.C. §102(b) as being anticipated by the admitted prior art in Fig. 1 and sections of the specification which describe prior art (“Prior Art Figure 1”) is improper.

- II) The final rejection of claims 7, 9-11, 30, 44 and 47 under 35 U.S.C. §102(b) as being anticipated by Apps et al. (4,932,532) (“Apps ‘532”) is improper.
- III) The final rejection of claims 1-4, 32-38, and 40-43 under 35 U.S.C. §103(a) as being unpatentable over Prior Art Figure 1 is improper.
- IV) The final rejection of claims 1-6, 25-29, 32-38 and 40-43 under 35 U.S.C. §103(a) as being unpatentable over Prior Art Figure 1 in view of Wise (4,848,580) is improper.
- V) The final rejection of claims 8 and 31 under 35 U.S.C. §103(a) as being unpatentable over Apps ‘532 in view of Elvin-Jensen (5,439,113) is improper.
- VI) The final rejection of claims 9, 11 and 45-47 under 35 U.S.C. §103(a) as being unpatentable over Apps ‘532 in view of Prior Art Figure 1 is improper.
- VII) The final rejection of claims 12-15 under 35 U.S.C. §103(a) as being unpatentable over Apps ‘532 in view of Wise is improper.
- VIII) The final rejection of claims 34, 38 and 39 under 35 U.S.C. §103(a) as being unpatentable over Prior Art Figure 1 or (Prior Art Figure 1 in view of Wise) in view of Elvin-Jensen is improper.
- IX) The final rejection of claim 43 as indefinite under 35 U.S.C. §112, second paragraph, is improper.

**Grouping of Claims**

The rejections of claims 1-15 and 25-47 are contested. Claims 1-15 and 25-47 do not stand or fall together.

For purposes of this appeal only and based upon the underlying rejections being appealed, Appellant groups the claims as follows:

I) For the rejection under 35 U.S.C. §102(b) as being anticipated by the Prior Art Figure 1, claims 1-4, 32-38 and 40-43 do not stand or fall together.

A) Claims 1, 32 and 35 stand or fall together.

B) Claims 3 and 4 stand or fall together, but do not stand or fall with the other groups A) and C).

C) Claim 37 does not stand or fall with groups A) or B).

II) For the rejection under 35 U.S.C. §102(b) over Apps '532, claims 7, 9-11, 30, 44 and 47 do not stand or fall together.

D) Claims 7, 30 44 and 47 stand or fall together.

E) Claims 9-11 stand or fall together but do not stand or fall with the claims in group D).

III) For the rejection under 35 U.S.C. §103(a) over Prior Art Figure 1, and only to the extent this rejection differs from the anticipation rejection in Group I),

F) Claims 1-4, 32-38, and 40-43 stand or fall together.

IV) For the rejection under 35 U.S.C. §103(a) over Prior Art Figure 1 in view of Wise, claims 1-6, 25-29, 32-38 and 40-43 do not stand or fall together.

G) Claims 1-6, 25, 32-36, 38 and 40-43 stand or fall together.

H) Claims 26 and 37 stand or fall together, but do not stand or fall with the claims of groups G), I) or J).

I) Claims 27 and 28 stand or fall together, but do not stand or fall with the claims of groups G), H) or J).

J) Claim 29 does not stand or fall with the claims of groups G)-I).

V) For the rejection under 35 U.S.C. §103(a) as being unpatentable over Apps '532 in view of Elvin-Jensen,

K) Claims 8 and 31 stand or fall together.

VI) For the rejection under 35 U.S.C. §103(a) over Apps '532 in view of Prior Art Figure 1, claims 9, 11 and 45-47 do not stand or fall together.

L) Claims 9 and 11 stand or fall together, but do not stand or fall with the claims of group M).

M) Claims 45-47 stand or fall together, but do not stand or fall with the claims of group L).

VII) For the rejection under 35 U.S.C. §103(a) over Apps '532 in view of Wise,

N) Claims 12-15 stand or fall together.

VIII) For the rejection under 35 U.S.C. §103(a) over Prior Art Figure 1 or (Prior Art Figure 1 in view of Wise) in view of Elvin-Jensen, claims 34, 38 and 39 do not stand or fall together.

O) To the extent this rejection differs from the anticipation rejection of Section I), Claims 34 and 38 stand or fall together, but do not stand or fall with the claims of group P).

P) Claim 39 does not stand or fall with the claims of group O).

IX) For the rejection under 35 U.S.C. §112, second paragraph,

Q) Claim 43 is the only claim rejected.

### **Argument**

In the Final Rejection mailed January 13, 2004, the Examiner indicates, "Applicant's arguments with respect to claims 1-4, 9, 11, 32-39 and 40-47 have been considered but are moot in view of the new ground(s) of rejection." (Page 9 of Final Rejection mailed January 13, 2004). However, all of the grounds for the rejections of the preceding office action are repeated in the Final Rejection (in addition to two new grounds). Therefore, all of the arguments in the preceding Amendment were still responsive to the Final Rejection.



Arguments are only “mooted” when they are agreed to and the ground of rejection to which they are directed is withdrawn. Arguments that the Examiner does not concede by withdrawing the rejection deserve some consideration and response. Applicant’s arguments in the Amendment before the Final Rejection were not “moot” - - unless the Examiner agrees with them - - and they deserved some consideration and response by the Examiner prior to the forthcoming Examiner’s Answer.

Appellant also objects to the onerous redundancy of the Final Rejection. The Final Rejection contains many rejections “in the alternative” or which are simply cumulative, and which only serve to burden Appellant on appeal. For example, claims 1, 32 and 35 are rejected as (referring to the Argument Sections below):

- I) Anticipated by Prior Art Figure 1;
- II) Obvious over Prior Art Figure 1; and
- III) Obvious over Prior Art Figure 1 in view of Wise.

A quick review of the Issues above shows that many of the claims are rejected under numerous cumulative or alternative grounds.

#### **D) Anticipation Rejection over Prior Art Figure 1**

##### **Claims 1-4, 32-38 and 40-43**

The Examiner argues that Prior Art Figure 1 and sections of the specification that describe prior art (hereinafter, collectively “Prior Art Figure 1”) anticipates Claims 1-4, 32-38 and 40-43.

##### **A) Claims 1-4, 32-38 and 40-43**

Prior Art Figure 1 shows an angled portion 18 at the top of the inner surface of the crate. In the angled portion 18, the dimension of the crate opening increases toward the top of the crate. However, in the angled portion 18, at any given distance from the bottom

surface of the crate, the crate opening is the same at any point along the inner periphery of the crate.

Claim 1 recites “a first portion of an inner surface of the side wall at the first distance from the bottom surface is formed to reduce the dimension of the crate opening in at least one selected area relative to a second portion of the inner surface of the side wall at the first distance from the bottom surface so as to provide a tighter fit with a drag rail of the like crate stacked thereon.” This requires a comparison of: a) the dimension of the crate opening at the first distance from the bottom surface at the “first portion” of the inner surface and b) the dimension of the crate opening at the first distance from the bottom surface at the “second portion” of the inner surface. The comparison of the dimensions of the crate opening must be done at the same “first distance” from the bottom surface. Independent claims 32 and 35 are similar to independent claim 1, but worded differently to state that the “first portion” is “formed to reduce the dimension of the crate opening at the at least one selected area relative to a second portion of the inner surface of the side wall at the first distance from the bottom surface,” (claim 32) and “a first portion of the inner surface of at least one of the side walls is formed to reduce the dimension of the upper opening of the crate in at least one selected area at the first distance from the bottom surface relative to a second portion of the inner surface at the first distance from the bottom surface, so as to provide a tighter fit with a drag rail of an identical crate stacked thereon.” (claim 35).

The Examiner apparently does not disagree that in Prior Art Figure 1, the dimension of the crate opening at the first distance from the bottom surface is constant. Instead, the Examiner argues that Prior Art Figure 1 shows a “first portion” that is *vertically offset* from the “second portion,” which, of course, results in different dimensions of the crate opening in the first and second portions. The Examiner defines his “first portion” as extending vertically *upward* 1 mm from the first distance and the “second portion” as extending vertically *downward* 1mm from the first distance. The Examiner then compares the dimension of the

crate opening at the top of the “first portion” to the bottom of the “second portion” - - 2 mm vertically apart, with neither crate opening dimension taken “at the first distance from the bottom surface” as claimed. The Examiner’s comparison of the crate opening at the first and second portions is not performed “at the first distance from the bottom surface” as claimed. Therefore, claims 1-4, 32-38 and 40-43 are patentable over Prior Art Figure 1.

B) Claims 3 and 4

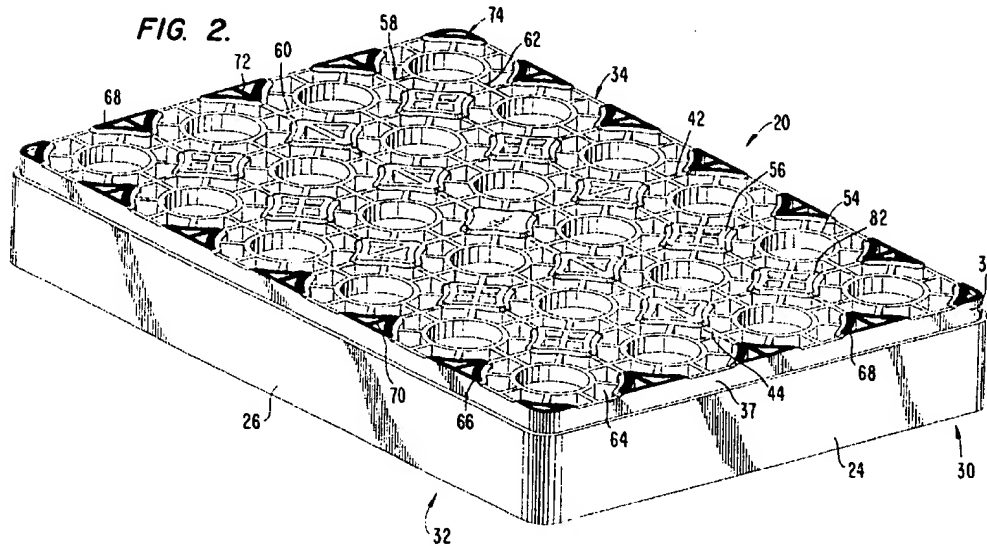
Since the Examiner’s “first portion” is spaced below the “second portion,” the “at least one selected area” of the first portion in which the dimension of the crate opening is reduced cannot comprise “an upper edge of the side wall,” as recited in claims 3 and 4. Looking at this another way, if the “first portion” is to be taken as the upper edge of the side wall in Prior Art Figure 1, the “second portion” cannot be above the “first portion,” as specified by the Examiner. Because claims 3 and 4 require that the “at least one selected area” in which the dimension of the crate opening is reduced comprises “an upper edge of the side wall,” and because the other claims and the Prior Art Figure 1 do not disclose this feature, claims 3 and 4 are each patentable independently.

C) Claim 37

Dependent claim 37 depends from claim 36 and further recites “wherein the at least one selected area is formed reducing the thickness of the side wall less at the at least one selected area at the first distance from the bottom surface than at the second portion of the inner surface at the first distance from the bottom surface.” Claim 37 specifies a comparison of the thickness at the first and second portions, both at the first distance from the bottom surface. Because claims 1-4, 32-36 and 40-43 do not recite the thickness differences recited by claim 37, and because the Prior Art Figure 1 does not disclose these thickness differences, claim 37 is independently patentable.

## II) Anticipation Rejection over Apps '532

The Examiner has rejected claims 7, 9-11, 30, 44 and 47 as anticipated by Apps '532 (U.S. Patent No. 4,932,532). Figure 2 from Apps '532 is reproduced below:



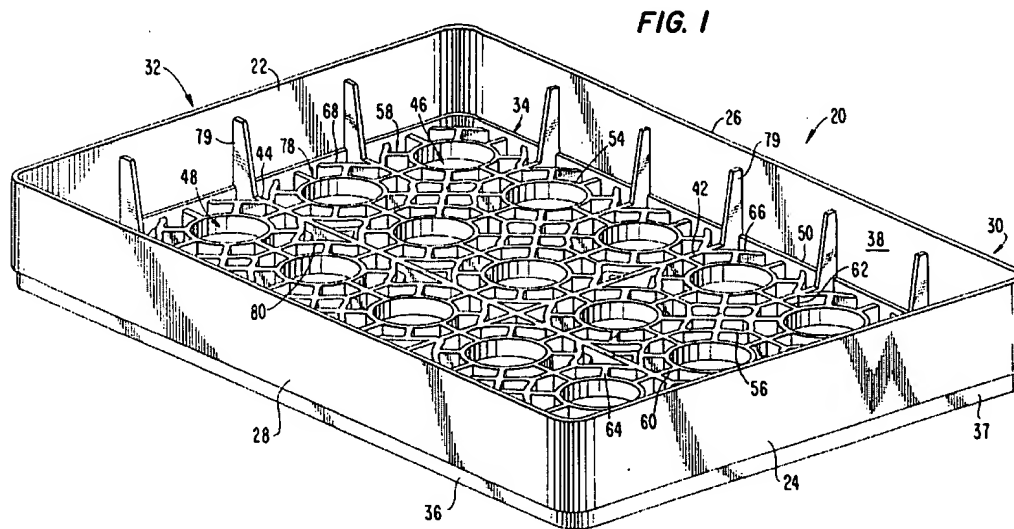
### D) and E) Claims 7, 9-11, 30, 44 and 47

The Examiner indicates that, in Apps '532, he is reading the rail at the bottom periphery of the crate, together with redoubt members 66, 68 and redoubt struts 70, 72 (shown in red above) as the claimed "drag rail." The redoubt members 66, 68 and redoubt struts 70, 72 are not a "rail" under any reasonable definition of the term "rail." Likewise, redoubt member and redoubt struts in combination with a rail are not a "rail," but rather "redoubt members, redoubt struts and a rail." Because the redoubt members and redoubt struts are not included in the "rail," the rail does not include "the lowermost surface of the crate" and is not a "drag rail" as required by claim 7. Therefore, claims 7, 9-11, 30, 44 and 47 are patentable.

### E) Claims 9-11

Claims 9 and 11 recite that the portion extending over the drag rail is in the corner and extends inwardly from both side walls. Even under the Examiner's interpretation of the posts

79 as “contoured portions,” a single contoured portion does not extend inwardly from both side walls in Apps ‘532, as clearly seen in Figure 1 of Apps ‘532, reproduced below.



The Examiner’s explanation of his rejection of claims 9 and 11 appears to rely on what the Examiner calls separate “contoured portions” over separate “drag rails” in Apps ‘532: “. . . the corner is defined such that it includes at least two reinforcing posts 79 and corresponding drag rails . . .” (Page 4 of Final Rejection mailed January 13, 2004. However, claims 9 and 11 refer to a “contoured portion” extending over a “drag rail,” from both the first and second side walls, not one contoured portion from the first side wall over one drag rail and a second contoured portion from the second side wall over a second drag rail. Because this feature is not in either Apps ‘532 or claim 7, claims 9 and 11 are independently patentable.

### **III) Obviousness Rejection over Prior Art Figure 1**

#### **F) Claims 1-3, 32-38 and 40-43**

The Examiner has rejected claims 1-4, 32-38 and 40-43 alternatively as being obvious, noting only that it would be obvious to stack two similar crates. Appellant does not

disagree that the crates in Prior Art Figure 1 were stacked and were intended to be stacked. However, these claims are not obvious or anticipated for the reasons explained above with respect to the Examiner's anticipation rejection.

#### **IV) Obviousness Rejection over Prior Art Figure 1 in View of Wise**

The Examiner claims to have rejected claims 1-6, 25-29, 32-38 and 40-43 as obvious over Prior Art Figure 1 in view of Wise (U.S. Patent No. 4,848,580). However, the Examiner states that Prior Art Figure 1 "discloses the entire invention" of claims 1, 32 and 35. This is not an obviousness rejection. This is an anticipation rejection - - one that is addressed in Section I) above (as are claims 2-4, 32-38 and 40-43). Independent of which claims the Examiner is actually rejecting as obvious, the Examiner's motivation for doing so is insufficient, as explained below.

##### **G) Claims 1-6, 25, 32-36, 38 and 40-43**

Wise discloses gussets (e.g. 77, 79, 81, 83) for reinforcing a lip 25 on the container. The lip 25 of the container includes a lip wall 73 extending upwardly from an outer periphery of a ledge 71 (Figure 2). Thus, when the lid 75 is placed on the container, it is supported by the lip wall 73, as are any containers stacked on the lid 75. Because the weight of stacked containers will bear on the lip wall 73 at the outer periphery of the lip ledge 71, Wise provides gussets 83 that angle outwardly from the side walls in order to provide support for the lip ledge 71 and lip wall 73.

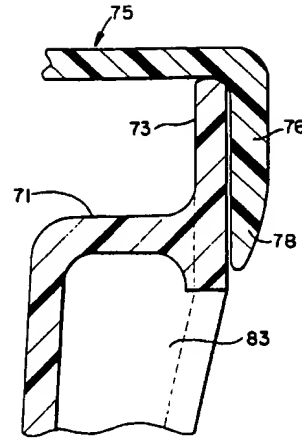
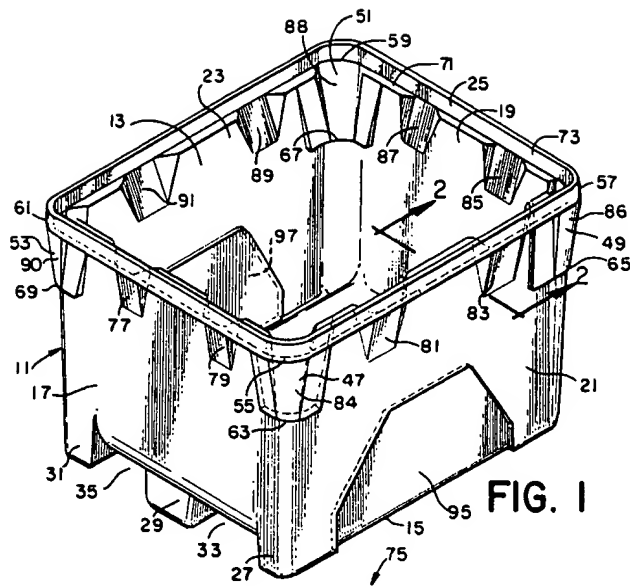


FIG. 2

Wise Figs. 1 and 2

However, these teachings of Wise are not relevant to the Prior Art Figure 1 container. There is no separate lip in the Prior Art Figure 1 container. There is only a single upper surface to the side wall. Adding the angled gussets of Wise would only weaken the side wall, not strengthen it. The rationale for providing gussets that is provided in Wise - - to support a lip edge and lip wall that extend outwardly from the side wall - - does not apply to the Prior Art Figure 1. Therefore, there is no motivation for modifying the Prior Art Figure 1 container to include the gussets of Wise and all of the claims 1-6, 25-29, 32-38 and 40-43 are not obvious.

#### H) Claims 26 and 37

Additionally, claim 26 specifies that the "thickness of the side wall decreases as the side wall extends upwardly from the bottom surface to enlarge a top opening of the crate, and the at least one selected area comprises a portion of the side wall where the thickness is reduced less." Claim 37 recites that the thickness of the side wall is reduced less at the selected area. The thickness of the side walls in Wise do not vary in the manner claimed in claims 26 or 37.

The walls that form the gussets in Wise are the same thickness as the side walls. Because the other claims and Prior Art Figure 1 and Wise do not include the claimed “varying thickness,” claims 26 and 37 are independently patentable.

I) Claims 27 and 28

Wise does not disclose that “at least one portion of an upper edge is vertically aligned with at least one portion of a lower edge of the side wall,” as recited in claim 27. This provides the ability to stack the crates, with one side wall resting upon another side wall of the lower crate. Instead, the walls of Wise nest within one another. Because this feature is not in Wise or in the other claims, claim 27 is independently patentable. Claim 28 depends from claim 27 and is therefore also patentable over Wise.

J) Claim 29

Because the gussets of Wise angle outwardly, the outer surface of the side wall is not generally perpendicular to the bottom surface as recited in claim 29. Because this feature is neither in Wise, nor in the other claims, claim 29 is independently patentable.

**V) Obviousness Rejection over Apps ‘532 in View of Elvin-Jensen**

K) Claims 8 and 31

The Examiner has rejected claims 8 and 31 as obvious over Apps ‘532 in view of Elvin-Jensen (U.S. Patent No. 5,439,113). Claims 8 and 31 recite, “wherein the inner side wall surface is formed as a variable radius blend into the bottom surface sufficient to position a portion of the side wall over the drag rail.” However, the Examiner describes Elvin-Jensen as disclosing only “areas of no radius where the wall is planar to areas where there is a radius.” First, this is an admission by the Examiner that there is only a single radius in Elvin-Jensen, because the Examiner calls the wall surface “no radius.” A single radius cannot be a “variable radius blend.” At the very least, even if the flat inner wall surface were taken as a radius different from that of the corner radius, the flat inner wall tangentially meets the radius



of the corner radius, which then proceeds at a second, fixed radius. In other words, at most, Elvin-Jensen discloses only two radii between the wall and the bottom surface, with zero “blend” and certainly no “variable radius blend.” If the “radius” of the wall were included as a radius, a graph of the radius of the corner of Elvin-Jensen would show: a) there are only two (at most) radii (the infinite radius of the flat inner surface of the wall and the fixed radius of the corner); and b) there is no “variable radius blend” because there would be a discontinuity between the “infinite” radius of the wall and the fixed, single radius of the corner. Therefore, Elvin-Jensen does not disclose a “variable radius blend” as required by claims 8 and 31.

The Examiner’s proposed motivation is “it would have been obvious to add the variable radius blend in order to make manufacturing easier since the larger radii near corner portions improve the releasability of the corner portion from male molds and these larger radii corner portions reduce the trapping of dirt and debris in these corner portions to enhance hygiene and cleanliness.” (Page 7 of Final Rejection Mailed January 13, 2004). None of the Examiner’s proposed motivation for this modification of the Apps ‘532 crate is found in either Apps ‘532 or Elvin-Jensen.

Additionally, the Examiner’s proposed motivation of reducing “the trapping of dirt and debris in these corner portions” simply does not work in the design in the Apps ‘532 patent. The Examiner is calling the posts 79 in the Apps ‘532 patent “the inner surface of the side wall.” With or without a variable radius blend, the posts 79 are walls perpendicular to the side walls 22, 24, 26, 28, and therefore form corners with the side walls. Thus, even if one were make the inner edge of the post 79 a “variable radius blend,” there would still be corners near the post 79. Therefore, there is no motivation for the proposed modification of Apps ‘532.

**VI) Obviousness Rejection Over Apps '532 in View of Prior Art Figure 1**

The Examiner has rejected claims 9, 11 and 45-47 as obvious over Apps '532 in view of Prior Art Figure 1.

The Examiner has not provided a *prima facie* case of obviousness because he has not identified the differences between the claimed invention and the prior art. On the contrary, the Examiner states that Apps '532 "discloses the entire invention" of claims 9, 11 and 47 (Page 7 of Final Rejection Mailed January 13, 2004). Since the Examiner has already rejected these claims under §102 over Apps '532, is this an argument by the Examiner in the alternative with respect to claims 9, 11 and 47? The Examiner's presentation is confusing. Appellant assumes that, for this rejection, the Examiner is admitting Appellant's arguments above regarding why Apps '532 does not anticipate claims 9 and 11, and that the Examiner is admitting that Apps '532 does not show a "drag rail" that "extends along at least substantially the entire length of the side wall," as claimed in claim 45, or that includes a "corner portion," as claimed in claim 47.

**L) Claims 9 and 11**

The Examiner has not offered any evidence of his proposed motivation for modifying the inner side wall surface at the corner to provide the claimed corner contoured portion "to reduce high stress concentration associated with non-contoured corner surfaces." (Page 7 of Final Rejection Mailed January 13, 2004). There is no evidence that there was a high stress concentration in the corners of Apps '532. Nor does the Examiner offer any evidence of his proposed modification to add a contoured portion in the corners of the Apps '532 crate. Therefore, claims 9 and 11 are not obvious over Apps '532. Because the claimed corner contoured portion is not required by claims 45-47 and is not obvious over Apps '532 and Prior Art Figure 1, claims 9 and 11 are independently patentable.

M) Claims 45-47

The Examiner has offered no evidence of his proposed motivation to extend the drag rail of Apps '532 into the corner. The Examiner, for this rejection, is apparently still calling the redoubts on the bottom of the Apps '532 crate a "drag rail," but admitting that they do not extend into the corner. However, there is no evidence in the Apps '532 of a need to "reduce drag rail forces and wear on the drag rail," as suggested by the Examiner. (Page 7 of Final Rejection Mailed January 13, 2004). Nor is there any evidence of the Examiner's proposed solution to extend the redoubts on the bottom of the Apps '532 crate into the corners of the crate as a way to address his proposed need. (Page 7 of Final Rejection Mailed January 13, 2004). Therefore, claims 45-47 are not made obvious by Apps '532. Because claims 45-47 recite that the drag rail extends "along at least substantially the entire length of the side wall" or that "the drag rail includes a corner portion," which is not obvious or required by claims 9 and 11, claims 45-47 are independently patentable over Apps '532 and Prior Art Figure 1.

**VII) Obviousness Rejection Over Apps '532 in View of Wise**

N) Claims 12-15

The Examiner has rejected claims 12-15 as obvious over Apps '532 in view of Wise. As explained above, Wise discloses gussets for the purpose of supporting a lip extending upwardly from a position outwardly of the periphery of the side walls. There is no such lip in Apps '532 that would benefit from this additional support. In fact, because Apps '532 includes a single upper edge of the side wall, the stability of the side wall would be reduced if gussets of the type shown in Wise were somehow added. This would also increase the lateral space required for storing the crates of Apps '532, as the gussets would take up space between adjacent crates. Therefore, claims 12-15 are not obvious.

**VIII) Obviousness Rejection Over Prior Art Figure 1 in View of Elvin-Jensen**

**O) Claims 34 and 38**

The Examiner has rejected claims 34, 38 and 39 as obvious over the Prior Art Figure 1 in view of Elvin-Jensen. The Examiner states that the Prior Art Figure 1 discloses the invention except for the “variable radius blend.” However, this claim term is not found in claim 34 or claim 38, but only in claim 39. Therefore, Appellant’s response in Section I) above as to why claims 34 and 38 are not anticipated by the Prior Art Figure 1 should be sufficient.

**P) Claim 39**

With respect to claim 39, for the reasons stated above in Section I), Prior Art Figure 1 does not include the elements of claims 32 and 35 (from which claims 34, 38 and 39 depend). For the reasons stated above in Section V), Elvin-Jensen does not disclose a “variable radius blend.” Therefore, claim 39 is patentable independently of claims 34 and 38.

Additionally, the Examiner’s proposed motivation for this modification of the Prior Art Figure 1 crate is found in neither the Prior Art Figure 1 crate nor in Elvin-Jensen. Nor does the Examiner allege that the proposed motivation would be in the general knowledge of those skilled in the art. Therefore, claims 34, 38 and 39 are patentable.

**IX) §112 Second Paragraph Rejection of Claim 43 as Indefinite**

**Q) Claim 43**

The Examiner has rejected claim 43 as indefinite. Claim 43 recites as follows:

43. The stackable crate of claim 42 wherein the side wall is joined to another side wall to form a corner, the at least one selected area comprises the corner and wherein the at least one area protrudes inwardly from the corner.

Claim 43 states that the “at least one selected area” comprises (i.e. includes, but is not limited to) the corner. The area also protrudes inwardly from the corner. This is not

indefinite or contradictory, since part of the area is the corner and part of the area is not the corner, but the area (specifically, the part that is not the corner) protrudes inwardly from the corner.

**CONCLUSION**

For the above reasons, 1-15 and 25-47 are patentable. Please charge \$330 for the Appeal Brief fee to Deposit Account No. 50-1984. If any other fees or extensions are due, please charge Deposit Account No. 50-1984.

Respectfully submitted,



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Dated: April 2, 2004

## Claims Appendix

1. A stackable crate for holding and transporting products comprising:  
a side wall integrally formed with a bottom surface, the side wall formed so that at least a portion of an opening in the crate at a first distance from the bottom surface has a larger dimension than the bottom surface; and  
a drag rail formed on an underside portion of the bottom surface and positioned inward of an outer peripheral support surface of the crate, the side wall formed so that a top surface of the side wall would contact the outer peripheral support surface of a like crate stacked thereon,  
wherein a first portion of an inner surface of the side wall at the first distance from the bottom surface is formed to reduce the dimension of the crate opening in at least one selected area relative to a second portion of the inner surface of the side wall at the first distance from the bottom surface so as to provide a tighter fit with a drag rail of the like crate stacked thereon.
2. The crate of claim 1 wherein the side wall is joined to another side wall to form a corner, and the at least one selected area comprises the corner.
3. The crate of claim 1 wherein the at least one selected area comprises an upper edge area of the side wall.
4. The crate of claim 1 further comprising a plurality of side walls formed as an open-top box having four corners, wherein the at least one selected area comprises an upper portion of each side wall at each corner.

5. The crate of claim 1 wherein the side wall tapers outwardly from a vertical plane as the side wall extends upwardly from the bottom surface to enlarge a top opening of the crate, and the at least one selected area comprises a portion of the inner surface of the side wall formed without taper.

6. The crate of claim 1 wherein the side wall tapers outwardly from a vertical plane as the side wall extends upwardly from the bottom surface to enlarge a top opening of the crate, and the at least one selected area comprises a portion of the inner surface of the side wall formed with reduced taper.

7. A crate for holding and transporting products comprising:  
a side wall integrally formed with a bottom surface; and  
a drag rail protruding from an underside portion of the bottom surface, the drag rail including a drag surface that is the lowermost surface of the crate, wherein an inner surface of the side wall is formed to position at least a portion of the side wall over the drag rail.

8. The crate of claim 7, wherein the inner side wall surface is formed as a variable radius blend into the bottom surface sufficient to position a portion of the side wall over the drag rail.

9. The crate of claim 7 wherein the side wall is a first side wall and is joined to a second side wall to form a corner, and the inner side wall surface of the first side wall and the second side wall is contoured at a lower surface of the corner so as to form a contoured portion extending inwardly from the first side wall and the second side wall over the drag rail.

10. The crate of claim 7 wherein the inner side wall surface is formed at a lower edge area proximate each vertically extending end of the side wall with an inwardly extending taper.

11. The crate of claim 7 further comprising a plurality of side walls formed as an open-top box having four corners, wherein a lower portion of each pair of adjacent side walls at the corner is contoured to form a single contoured portion extending inwardly from each of the two adjacent side walls over the drag rail.

12. The crate of claim 7 wherein the side wall is integrally formed with the bottom surface so that at least a portion of an opening in the crate has a larger dimension than the bottom surface, and another portion of an inner surface of the side wall is formed to reduce the dimension of the crate opening in at least one selected area so as to provide a tighter fit with a drag rail of a crate stacked thereon.

13. The crate of claim 12 wherein the side wall is joined to another side wall to form a corner, and the at least one selected area comprises the corner.

14. The crate of claim 12 wherein the at least one selected area comprises an upper edge area of the side wall.

15. The crate of claim 12 further comprising a plurality of side walls formed as an open-top box having four corners, wherein the at least one selected area comprises an upper portion of each side wall at each corner.



25. The stackable crate of claim 1 wherein an inner surface of the side wall angles outwardly as the side wall extends upwardly from the bottom surface to enlarge a top opening of the crate, and the at least one selected area comprises a portion of the inner surface of the side wall angled less outwardly.

26. The stackable crate of claim 25 wherein a thickness of the side wall decreases as the side wall extends upwardly from the bottom surface to enlarge a top opening of the crate, and the at least one selected area comprises a portion of the side wall where the thickness is reduced less.

27. The stackable crate of claim 25 wherein at least one portion of an upper edge of the side wall is vertically aligned with at least one portion of a lower edge of the side wall, such that the side wall would support a side wall of an identical crate stacked on top of the crate and such that side walls of identical, stacked crates would not nest one within the other.

28. The stackable crate of claim 27 wherein the side wall meets the bottom surface at a lower corner of the crate, the drag rail protruding downward from the underside of the bottom surface at the lower corner.

29. The stackable crate of claim 28 wherein an outer surface of the side wall is generally perpendicular to the bottom surface.

30. The crate of claim 7 wherein the drag rail protrudes downward from the underside portion of the bottom surface inward of the outer edge of the crate, the side wall meeting the bottom surface at a lower corner of the crate, the side wall further including a contact surface on a lower edge of the side wall adjacent to and outward of the drag rail at the

lower corner, the contact surface dimensioned so as to rest on a top surface of a side wall of an identical crate.

31. The crate of claim 30, wherein the inner side wall surface is formed as a variable radius blend into the bottom surface sufficient to position a portion of the side wall over the drag rail.

32. First and second identical stacked crates for holding and transporting products each comprising:

a side wall integrally formed with a bottom surface, an inner surface of the side wall moving outwardly from a vertical plane as the side wall extends upwardly from the bottom surface to enlarge an opening of the crate at a first distance from the bottom surface, at least one selected area of the side wall at the first distance from the bottom surface comprising a first portion of the inner surface of the side wall formed to reduce the dimension of the crate opening at the at least one selected area relative to a second portion of the inner surface of the side wall at the first distance from the bottom surface;

a drag rail extending from an underside portion of the bottom surface, the drag rail positioned inward of an outer peripheral edge of the crate; and

the first crate supported on a top surface of the side wall of the second crate with the drag rail of the first crate positioned inward of the side wall and the at least one selected area of the second crate so as to provide a tighter fit between the drag rail of the first crate and the at least one selected area of the second crate.

33. The first and second crates of claim 32 wherein the side wall of the first crate is positioned directly on top of and supported by the side wall of the second crate, and wherein the drag rail of the first crate is positioned adjacent the side wall of the second crate.

34. The first and second crates of claim 33 wherein at least a portion of the side wall of the first crate is positioned directly on top of both the side wall of the second crate and the drag rail of the first crate.

35. A stackable crate for holding and transporting products comprising:  
a plurality of side walls generally perpendicular to and integrally formed with a bottom surface, an inner surface of each of the side walls moving outwardly from a vertical plane as the side wall extends upwardly from the bottom surface to enlarge an upper opening of the crate at a first distance from the bottom surface, at least one portion of an upper edge of each of the side walls being vertically aligned with at least one portion of a lower edge of the each of the side walls; and  
a drag rail formed on an underside portion of the bottom surface and positioned inward of an outer periphery of the lower edges of the plurality of side walls,

wherein a first portion of the inner surface of at least one of the side walls is formed to reduce the dimension of the upper opening of the crate in at least one selected area at the first distance from the bottom surface relative to a second portion of the inner surface at the first distance from the bottom surface, so as to provide a tighter fit with a drag rail of an identical crate stacked thereon.

36. The stackable crate of claim 35 wherein a thickness of each of the side walls is reduced as the side wall extends upwardly from the bottom surface.

37. The stackable crate of claim 36 wherein the at least one selected area is formed reducing the thickness of the side wall less at the at least one selected area at the first

distance from the bottom surface than at the second portion of the inner surface at the first distance from the bottom surface.

38. The stackable crate of claim 36 wherein the inner surface of each of the side walls is formed to position at least a portion of the side wall over the drag rail.

39. The stackable crate of claim 38, wherein the inner surface of the side wall is formed as a variable radius blend into the bottom surface sufficient to position a portion of the side wall over the drag rail.

40. The stackable crate of claim 1 wherein the drag rail protrudes downwardly from the underside portion of the bottom surface and wherein the drag rail includes drag surface that is a lowermost surface of the crate.

41. The stackable crate of claim 1 wherein the crate includes an inner peripheral surface at the first distance from the bottom surface, and wherein the at least one selected area is formed on the inner peripheral surface such that the at least one area reduces the dimension of the crate opening relative to a portion of the inner peripheral surface adjacent the at least one area at the first distance from the bottom surface.

42. The stackable crate of claim 1 wherein the crate includes a generally rectangular inner peripheral surface at the first distance from the bottom surface, wherein at least a portion of the inner peripheral surface has a larger inner dimension than the bottom surface, and wherein the at least one area protrudes inwardly from the generally rectangular inner peripheral surface at the first distance from the bottom surface.

43. The stackable crate of claim 42 wherein the side wall is joined to another side wall to form a corner, the at least one selected area comprises the corner and wherein the at least one area protrudes inwardly from the corner.

44. The crate of claim 7 wherein the drag rail extends at least substantially parallel to the side wall.

45. The crate of claim 7 wherein the drag rail extends along at least substantially the entire length of the side wall.

46. The crate of claim 45 wherein the drag rail extends at least substantially parallel to the side wall.

47. The crate of claim 7 wherein the drag rail includes a corner portion.